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No. 92-1180

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES DANIEL GOOD REAL PROPERTY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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I. Respondent first attempts (Br. 9-40) to defend the court of appeals' holding that the seizure of the respondent property violated the Due Process Clause. The due process issue is narrow. No one was ousted from actual possession when the premises were seized. Good did not even reside on the premises at the time, and, in accordance with Justice Department policy (see Gov't Br. 13-14 n.6), Good's tenants were permitted to remain on the premises during the pendency of the forfeiture proceeding. Compare *United States* v. *A Parcel of Land, Buildings, Appurtenances and Improvements, Known as 92 Buena Vista Ave.*, 113 S. Ct. 1126, 1130 n.3 (1993) (plurality opinion). Moreover, and again in accordance with Justice Department policy concerning seizures of real property (see Gov't Br. 12-13 & n.5), the government,

before seizing the premises, obtained a warrant from a U.S. magistrate, based on a finding of probable cause to believe that the property was subject to forfeiture. The seizure therefore fully complied with the Fourth Amendment. Finally, there is no question presented concerning the timing of Good's *post*-seizure hearing.[1]

Accordingly, the question is whether the Due Process Clause rendered unconstitutional the seizure of the premises pursuant to a warrant lawfully issued and executed under the Fourth Amendment, because respondent was not afforded prior notice and an opportunity for a hearing. The answer to that question is no. The only consequence of the seizure was that Good's tenants thereafter paid their monthly rent to the U.S. Marshal, to be held in escrow, rather than to Good. This Court has repeatedly held that a claimant has no due process right to pre-seizure notice and a hearing when forfeiture proceedings result in the temporary loss of money or other personal property. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974); *United States* v. *$8850*, 461 U.S. 555, 562 n.12 (1983); *United States* v. *Von Neumann*, 474 U.S. 242, 249 n.7 (1986). And in this case, the warrant issued by a neutral and detached magistrate served to protect whatever further interests Good or his tenants might have had in the property due to its use as a residence.

A. Respondent asserts (Br. 32), however, that, "[b]y its terms, the Fourth Amendment does not even contemplate the seizure of real property." That assertion is refuted by the first Clause of the Amendment, which provides: "The right of the people to be secure in their persons, *houses*, papers, and effects, *against unreasonable*

[1] Any such claim would be governed by the four-part test in *United States* v. *$8850*, 461 U.S. 555, 564 (1983).

searches and *seizures*, shall not be violated" (emphasis added).

Respondent ignores the Amendment's first Clause and relies (Br. 32) instead on its Warrant Clause, which requires that any warrant "particularly describ[e] the place to be searched, and the persons or things to be seized." In respondent's view, that language suggests that the Amendment "authorizes the search of a 'place,' but not its seizure; and the seizure of 'persons' and 'things,' but not 'places.'" Resp. Br. 32. A "house," however, is a "thing," and its seizure therefore is contemplated by the Warrant Clause.[2]

If respondent's narrow reading of the Warrant Clause were correct, the result would not be that seizures of houses are not contemplated by the Fourth Amendment, for as its first Clause shows, they are; the result, rather, would be that such seizures would not fall within the Warrant Clause, with the implication that a warrant is unnecessary in order for a seizure (as distinguished from a search) of a house to be "reasonable" under the first Clause. That, presumably, is not a construction that respondent would endorse.

Respondent argues (Br. 36-37) that the seizure was not authorized by Fed. R. Crim. P. 41(b) because the property did not constitute evidence of a criminal offense, contraband, or "property designed or intended for use or which is or has been used as the means of committing a

[2] Respondent's crabbed reading also is contrary to the broad protective purposes and historic application of the Fourth Amendment. This Court, for example, has enforced the Amendment with respect to business premises, even though they do not literally fall within the enumeration of "persons, houses, papers, and effects" in the first Clause. See, *e.g.*, *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 311-313 (1978); *Camara* v. *Municipal Court*, 387 U.S. 523, 543 (1967); 1 W. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 2.4(b), at 429 (2d ed. 1987).

criminal offense." To the contrary, a house in which a person manufactures, stores, or buys and sells drugs is "property * * * which * * * has been used as the means of committing a criminal offense" under 21 U.S.C. 841(a)(1). That Section makes it a crime to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance," and gives rise to civil or criminal forfeiture under 21 U.S.C. 881(a)(7) or 21 U.S.C. 853(a)(2) of property "used, or intended to be used, * * * to commit" a violation. See J.A. 12 (complaint for forfeiture alleging property was used in violation of 21 U.S.C. 841); J.A. 31 (affidavit of DEA agent stating that Good pleaded guilty to "promoting a harmful drug").

In any event, the Fourth Amendment is not limited to criminal proceedings; its protection "applies in the civil context as well." *Soldal* v. *Cook County*, 113 S. Ct. 538, 546 (1992); see also *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 312 (1978); *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967). In 21 U.S.C. 881(b), Congress authorized the issuance of a warrant for the seizure of property for civil forfeiture in the same manner as is provided for a search warrant under the Federal Rules of Criminal Procedure. The effect is to make Rule 41 applicable to civil forfeiture. The seizure of the respondent property for forfeiture therefore was specifically regulated—and authorized—by procedures enacted by Congress to implement the Fourth Amendment. Respondent's submission that seizures for forfeiture are entirely outside the scope of the Fourth Amendment is, in short, without merit.

It is through the Fourth Amendment that the Framers of the Bill of Rights struck the balance they deemed appropriate between the people's security in their persons, houses, papers, and effects and the public interest in effecting searches and seizures for law enforcement purposes. *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 559 (1978); *United States* v. *United States District Court*, 407 U.S. 297, 314-315 (1972). Compliance with the standards and procedures prescribed by the Fourth Amendment constitutes all the "process" that is "due" a forfeiture claimant under the Fifth Amendment. Respondent therefore errs in relying (Br. 10-12) on the generalized due process principles of *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), and its progeny.

The Court made that very point in *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), with respect to the detention of a criminal defendant pending trial. The Court observed that "[t]he historical basis of the probable cause requirement is quite different from the relatively recent application of variable procedural due process in debtor-creditor disputes and termination of government-created benefits," and that the Fourth Amendment's "balance between individual and public interests always has been thought to define the 'process that is due' for seizures of person or property in criminal cases, including the detention of suspects pending trial." *Id.* at 125 n.27. Respondent seeks to distinguish *Gerstein* by quoting a further passage in that opinion, in which the Court pointed out that "the Fourth Amendment probable cause determination is in fact only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct." Resp. Br. 35 (quoting 420 U.S. at 125 n.27); see also ACLU Br. 14-15. That passage, however, addresses the *post*-seizure procedural protections in criminal prosecutions, not the *pre*-seizure provisions that are at issue here. Both criminal prosecutions and civil forfeiture proceedings involve elaborate post-seizure protections against adjudicative error. The difference in the nature of those protections reflects the different intensity of the private interests at stake and the different constitutional provisions that

govern; it in no way undercuts the proposition that the Fourth Amendment fully regulates the seizure itself in both settings.

In other contexts as well, the Court has repeatedly held that the specific protections of the Fourth Amendment, rather than the general terms of the Due Process Clause, govern the seizure of persons and property. See *Graham* v. *Connor*, 490 U.S. 386, 394-395 (1989); *Baker* v. *McCollan*, 443 U.S. 137, 143-146 (1979); *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 352 n.18 (1977); Gov't Br. 25-27. In *Soldal* the Court observed—in the specific context of the seizure of a home—that it had chosen in *Graham* "the more 'explicit textual source of constitutional protection' over the 'more generalized notion of "substantive due process"'" (113 S. Ct. at 548 (quoting *Graham*, 490 U.S. at 395)); and the Court again chose in *Soldal* to "resort * * * to the Fourth Amendment's specific protection for 'houses, property [*sic*], and effects' rather than the general protection of property in the Due Process Clause." 113 S. Ct. at 548.

Even if the Court were to conclude that its Fourth Amendment precedents are not strictly applicable, the forfeiture setting is, at the very least, closely analogous to those in which the Court has sustained the constitutionality of seizures under Fourth Amendment standards. The deeply rooted practice of relying on the protection afforded by a warrant, issued by a neutral and detached magistrate on the basis of probable cause, strongly supports the conclusion that due process was fully satisfied here by use of the same procedure to determine the existence of the requisite probable cause.

B. The Court has already expressly held that "seizure for purposes of forfeiture is one of those '"extraordinary situations" that justify postponing notice and opportunity for a hearing.'" *Calero-Toledo*, 416 U.S. at 677 (quoting *Fuentes*, 407 U.S. at 90). Respondent maintains

(Br. 38) that the Court engaged in a "balancing" analysis to justify the particular seizure in *Calero-Toledo*. In fact, however, the Court stated the rule against pre-seizure notice and hearing in categorical terms. It then identified three considerations, discussed below, that support that general rule. 416 U.S. at 679.[3]

The court of appeals did not question that the first and third of those considerations are present here as well. Neither did respondent in the brief in opposition. Both sought to distinguish *Calero-Toledo* solely by reference to the second consideration. See Pet. App. 14a-15a; Br. in Opp. 10-11. Now, however, respondent claims (Br. 11-23) that none of the three considerations identified in *Calero-Toledo* is present here. Even if we assume, *arguendo*, that respondent is correct that an ad hoc balancing approach is appropriate, it does not follow that a different "balance" should be struck in this case. There are other factors present here (but absent in *Calero-Toledo*) that weigh heavily in support of the same result in this case as in *Calero-Toledo*—namely, no one was deprived of possession of the seized property, and the additional protection of a warrant was afforded. In any event, there is no merit to respondent's contention that the *Calero-Toledo* rationale is inapplicable here.

[3] Respondent relies (Br. 21-22) on the concluding sentence of the Court's due process discussion in *Calero-Toledo* (416 U.S. at 679-680): "In these circumstances, we hold that this case presents an 'extraordinary' situation in which postponement of notice and hearing until after seizure did not deny due process." In context, however, the Court was simply stating that *Calero-Toledo* presented an "extraordinary situation" warranting postponement of notice and hearing because it fell within the category of "seizure[s] for purposes of forfeiture" for which the Court previously had stated a general rule against a requirement of prior notice and hearing. See 416 U.S. at 677.

1. First, here, as in *Calero-Toledo*, seizure "serves significant governmental purposes" by "permit[ting] [the government] to assert *in rem* jurisdiction over the property in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions." 416 U.S. at 679 (footnote omitted); see also *Republic National Bank* v. *United States*, 113 S. Ct. 554, 557 (1992). Respondent contends (Br. 13) that "[i]n the case of real property, *in rem* jurisdiction over the property itself can always be obtained after giving the owner a hearing to contest the seizure." But respondent does not explain how the court would have jurisdiction to conduct such a hearing without first obtaining *in rem* jurisdiction over the property.

Respondent also contends (Br. 14-15) that jurisdiction could be obtained in a manner that is "far less intrusive" than seizure—*e.g.*, by posting a warrant of arrest on the property. This Court has stated that prior seizure of the premises by executive officials is necessary for institution of forfeiture proceedings. *Dobbins's Distillery* v. *United States*, 96 U.S. 395, 396 (1878); see also 1 D. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 9.01[2], at 9-4 to 9-7 (1992). It may be that, in some circumstances, a court can acquire bare jurisdiction over real property through service of a warrant of arrest. See *United States* v. *Twp 17 R 4, Certain Real Property in Maine*, 970 F.2d 984, 986 & n.4, 989 (1st Cir. 1992) (warrant of arrest posted on vacant land). But seizure ordinarily would be necessary for the court to acquire and exercise meaningful custody over the premises and to ensure against its continued use for illegal purposes. See generally *Smith*, *supra*, ¶ 9.01[4], at 9-9 to 9-16.

For these reasons, and because some form of physical seizure has historically accompanied the institution of

forfeiture proceedings, the first consideration identified in *Calero-Toledo* is present in this case as well. And it is reinforced by the fact that the seizure was "far less intrusive" (Resp. Br. 15) here than in *Calero-Toledo*, where the government obtained complete possession of the property, to the exclusion of the owner and the lessee.

2. Because the property seized in this case cannot be moved, respondent dismisses (Br. 15-19) as irrelevant the second consideration identified in *Calero-Toledo*: that "preseizure notice and hearing might frustrate the interests served by the [forfeiture] statutes, since the property seized—as here, a yacht—will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given." 416 U.S. at 679. The Court did not suggest in *Calero-Toledo*, however, that it was necessary for the government to show in every case that removal, concealment, or destruction of the property was likely in order for a seizure to be justified without prior notice and hearing; it simply observed that property subject to forfeiture "will often be of a sort" that raises those concerns. The quoted passage thus confirms that the Court stated a categorical rule in *Calero-Toledo*, based on the characteristics of forfeited property generally.

Moreover, although a residence cannot normally be "removed" to another jurisdiction (but see *Soldal* v. *Cook County*, *supra*), a residence, just like a yacht, can be "destroyed," and its contents (which may also be subject to forfeiture or constitute evidence of a crime) can be "concealed." Respondent attempts to discount (Br. 16) those concerns by pointing to the government's practice of allowing occupants to remain in possession pending final disposition of the forfeiture proceeding. Respondent ignores the fact that the government enters into such occupancy agreements only *after* seizure, and therefore

after the government has had an opportunity to ensure that the premises are safe and sound and are not still being used for illegal purposes. And as respondent acknowledges (Br. 16), the occupancy agreement obligates the owner or occupant to maintain the premises and to refrain from illegal use in the future.

3. Finally, "unlike the situation in *Fuentes*, seizure [for forfeiture] is not initiated by self-interested private parties; rather, [government] officials determine whether seizure is appropriate under the provisions of the [federal] statutes." *Calero-Toledo*, 416 U.S. at 679. Respondent pays little attention to this language, and instead quotes a passage from *Fuentes* that was recited earlier in the *Calero-Toledo* opinion. In that passage, the Court observed that the circumstances in which immediate seizure of property had been permitted in the past were those in which, *inter alia*, the person initiating it was "a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." *Fuentes*, 407 U.S. at 91. Respondent argues (Br. 19-21) that that standard is not satisfied here because 21 U.S.C. 881(a)(7) is not "narrowly drawn."

That argument ignores the fact that the operative passage in *Calero-Toledo* makes no mention of a "narrowly drawn" statute; it notes only that government officials, rather than interested private parties, institute seizures for purposes of forfeiture.[4] In addition, the issuance of a seizure warrant by a magistrate in this case more than satisfied whatever protective purposes might be served in other settings under respondent's view that the

[4] Significantly, the Court did not discuss in *Calero-Toledo*, *$8850*, or *Von-Neumann* whether the relevant statute was "narrowly drawn."

statute under which the seizure takes place must itself be narrowly drawn.[5]

4. In sum, the seizure in this case falls within a general category, consisting of "seizure[s] for purposes of forfeiture," that need not be preceded by notice and an opportunity for a hearing under the Due Process Clause. See also *$8850*, 461 U.S. at 562 n.12; *Von Neumann*, 474 U.S. at 249 n.7; Gov't Br. 30-31. That conclusion is consistent with our submission in Point A that the Fourth Amendment, not the Due Process Clause, furnishes the governing standards for all such seizures.[6]

C. Finally, and contrary to respondent's contention (Br. 23-30), the three-part "balancing" test of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), leads to the same conclusion.

1. The "private interest" at issue, 424 U.S. at 335, is relatively minor, since Good was not residing on the premises and his tenants remained in possession. Under Justice Department policy, the only change wrought by a typical seizure is that continued occupancy is subject to an agreement that recognizes the government's interest in protecting its claim to the property and obligates the

[5] Respondent suggests (Br. 21) that the third factor identified in *Calero-Toledo* should be reconsidered because, although forfeiture is "not initiated by self-interested private parties," DEA is a "self-interested *public* party" by virtue of its eligibility to receive a portion of the deposits in the Asset Forfeiture Fund. See 21 U.S.C. 881(e). The potential impact that the receipt of such funds by DEA as a whole might have on any particular agent who might seize property is too remote and speculative to raise any due process issue in this regard. See *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238 (1980).

[6] Significantly, as the Court noted in *Calero-Toledo*, 416 U.S. at 679 n.14, *Fuentes* itself had distinguished a seizure under a search warrant from a seizure under a writ of replevin, in light of the special protections afforded by Fourth Amendment practice. See 407 U.S. at 93-94 n.30.

owner to maintain the property and refrain from making illegal use of it. In this case, Good's tenants thereafter made their rental payments to the U.S. Marshal in escrow; but the consequence for Good was no different from the loss of the use of the cash in *$8850*, which this Court held did not require prior notice and a hearing.[7]

Respondent argues (Br. 24) that as a result of the seizure, Good lost his rights under Hawaii law to enforce the tenants' obligation for maintenance of the dwelling, to have reasonable access to inspect and ensure proper use of the premises, and to re-enter at the end of the lease. Because Good was not divested of ownership until the judgment of forfeiture was entered, see *92 Buena Vista Ave.*, 113 S. Ct. at 1134-1137 (plurality opinion), we see no reason why he could not have enforced those rights prior to judgment; and as respondent points out (Br. 3), the government was willing to allow Good to resume occupancy following the seizure and before final judgment. Respondent also objects (Br. 24) that Good was "restrained from transferring the property" as a result of the seizure. But respondent elsewhere concedes (Br. 37-38) that "[t]he government had prevented Good

[7] Although respondent states (Br. 24) that rents from the premises were an important source of income for him, he acknowledges (Br. 25) that it is necessary under *Mathews* v. *Eldridge* to look to "cases generally," "not just the case involving the particular claimant." There is no suggestion in *Calero-Toledo*, *$8850*, or *Von Neumann* that any hardship allegedly resulting from a particular seizure would require prior notice and a hearing in that case. It would not in any event be possible for DEA to ascertain the potential for such hardship prior to seizure. The other cases respondent cites (Br. 24-25) in support of the claim that alleged hardship weighs in favor of prior notice and hearing—*Fuentes* v. *Shevin*, *supra*; *Connecticut* v. *Doehr*, 111 S. Ct. 2105 (1991), and *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969)—all involved disputes between private parties and therefore are of little relevance to this case.

from alienating his property by the filing of a 'Notice of Pendency of Action' on the day the complaint was filed," and that "[f]urther seizure to prevent alienation was unnecessary."

2. The second *Mathews* v. *Eldridge* factor—"the procedures used, and the probable value, if any," of an adversary hearing, 424 U.S. at 335—likewise provide no support for respondent's position. In *Gerstein* v. *Pugh*, this Court considered those factors in the context of seizures of a person pending trial, which are governed by the same legal standard—probable cause—that governs here. The Court concluded that the existence of probable cause "can be determined reliably without an adversary hearing," and that "[t]he use of an informal procedure is justified not only by the lesser consequences of a probable cause determination but also the nature of the determination itself." 420 U.S. at 120, 121. Although additional procedures might enhance the reliability of probable cause determinations in some cases, the Court determined that "[i]n most cases * * * their value would be too slight to justify holding, as a matter of constitutional principle, that these formalities and safeguards designed for trial must also be employed in making the Fourth Amendment determination of probable cause." *Id.* at 122. Indeed, a prior adversary hearing would have served no purpose at all in this case. Good had pleaded guilty to a drug offense based on the conduct that gave rise to forfeiture, and the warrant application was supported by an affidavit describing the evidence seized from the house. See Gov't Br. 34 n.22.

Respondent does not address the analysis in *Gerstein* v. *Pugh*. Respondent simply asserts (Br. 25-28), with no empirical support, that an adversarial hearing would reduce the risk of erroneous deprivation to some unspecified degree. Moreover, the Justice Department's policy of obtaining a warrant guards against a number of

the risks to which respondent adverts—that the government might seize property when the underlying criminal activity never occurred, that the property might lack sufficient nexus to criminal activity, that the tract seized would extend beyond that actually involved in criminal activity, and that the property might belong to an innocent owner.

Respondent points out (Br. 26) that the Court found an ex parte determination of probable cause inadequate in *Connecticut* v. *Doehr*, 111 S. Ct. at 2114. But the procedure there called for little more than conclusory affidavits and a watered-down version of the probable-cause standard. *Doehr* in no way undermines the integrity and reliability of the established procedure for obtaining a warrant from a U.S. magistrate in accordance with the Fourth Amendment and its attendant safeguards. See Gov't Br. 22-23. Compare *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 612, 615-618 (1974); *FDIC* v. *Mallen*, 486 U.S. 230 (1988); *Commissioner* v. *Shapiro*, 424 U.S. 614, 629-630 & nn.11-12, 633-634 (1976); cf. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 606-608 (1975); *Bell* v. *Burson*, 402 U.S. 535, 540, 542 (1971); *Mathews* v. *Eldridge*, 424 U.S. at 334.

3. The "Government's interest," *Mathews* v. *Eldridge*, 424 U.S. at 335, points in the same direction. By operation of 21 U.S.C. 881, the government itself claims title to the property. Compare *Connecticut* v. *Doehr*, 111 S. Ct. at 2115. Contrary to respondent's contention (Br. 29-30), the government has a strong interest in protecting the property, see *W.T. Grant Co.*, 416 U.S. at 607-608; *Calero-Toledo*, 416 U.S. at 679, acquiring jurisdiction over it, and preventing its use for illegal purposes, *ibid.* At the same time, a requirement that novel procedures for pre-seizure notice and opportunity for a hearing be instituted, outside the normal progression of forfeiture cases that has been followed for two centuries (see Gov't Br. 20 n.12), would impose a substantial burden on both the courts and the Executive Branch. Respondent has failed to justify such a radical departure from "[h]istorical and contemporary practice." *Connecticut* v. *Doehr*, 111 S. Ct. at 2115.

II. Respondent also fails (Br. 40-50) to mount a persuasive defense of the court of appeals' unprecedented ruling that this action must be dismissed if the district court should conclude on remand that it was not timely commenced under 19 U.S.C. 1602-1604.

A. In holding that this suit is subject to dismissal, even though it concededly was filed within the five-year statute of limitations in 19 U.S.C. 1621, the court of appeals relied principally on 19 U.S.C. 1603(b). See Pet. App. 4a-12a. Respondent reads Section 1603(b) to impose a duty on DEA or FBI agents, when they first learn of a drug violation, to report it "promptly" to the U.S. Attorney. See Resp. Br. 40-41. However, under 19 U.S.C. 1603(b), the duty to report "promptly" is triggered only when "a seizure * * * for violation of the [drug] laws is made, or a violation of the [drug] laws is discovered," *and* "legal proceedings by the United States attorney in connection with such seizure or discovery are required."

Unlike the court of appeals (see Pet. App. 9a), respondent recognizes (Br. 41) that the reporting duty is triggered only when judicial proceedings are "required" following a seizure or discovery of a violation. But respondent insists (Br. 41) that the only "significance of the reference to 'judicial proceedings' being 'required' is that in some cases, property may be forfeited administratively without judicial proceedings." Respondent believes it was evident from the outset that judicial proceedings would be "required" in this case, because the property was worth more than $100,000 (then the maximum value of property subject to administrative forfeiture, 19 U.S.C. 1607 (1988)), and because the Justice

Department, as a matter of policy, seeks forfeiture of real property only in judicial proceedings. See Resp. Br. 41-42 & n.10.

In the forfeiture context, when a violation of the customs (or drug) laws has been discovered, judicial proceedings by the U.S. Attorney are not "required" until after the property has been seized and, in addition, (i) it is determined that administrative forfeiture procedures cannot be utilized (because the value of the property exceeds the statutory limit), or (ii) administrative forfeiture procedures have been instituted by the seizing agency, but a claimant has asserted an interest in the property and filed a cost bond. See Gov't Br. 37 n.23. Once those steps have occurred, legal proceedings in court are "required" both to perfect the title to the property that the government has advanced by seizing the property, see *92 Buena Vista Ave.*, 113 S. Ct. at 1134-1137 (plurality opinion), and to afford any claimants the opportunity for a post-seizure hearing that is mandated by the Due Process Clause and *$8850*. Prior to seizure, however, no provision of the Constitution or an Act of Congress "requires" that judicial proceedings be instituted.[8] Because there was no seizure in this case prior to filing the forfeiture action, judicial proceedings were not "required," and the duty to

[8] Even after a case has been reported to the Attorney General, she is not required by 19 U.S.C. 1604 to file a forfeiture proceeding or other legal action. Section 1604 provides that the Attorney General shall immediately inquire into the facts and file an action "forthwith" if she concludes that any fine, penalty, or forfeiture has been incurred by reason of the violation, "unless, upon inquiry and examination, the Attorney General decides that such proceedings can not probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted."

report a violation "promptly" to the U.S. Attorney therefore was never triggered.[9]

B. Even if the reporting duty in 19 U.S.C. 1603(b) was triggered prior to the institution of this forfeiture action, a failure to make such a report "promptly" does not give a claimant the right to have a forfeiture action dismissed.

In *French* v. *Edwards*, 80 U.S. (13 Wall.) 506 (1872), this Court noted that there are "many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual." *Id.* at 511. Significantly, the Court included in that category "regulations

[9] Respondent also makes a distinct untimeliness argument, relying on Judge Ferguson's concurring opinion in *United States* v. *Tax Lot 1500*, 861 F.2d 232, 236 (9th Cir. 1988), cert. denied, 493 U.S. 954 (1989). That argument turns on the language in 21 U.S.C. 881(a)(7) stating that real property is subject to forfeiture if it "is used, or intended to be used," to facilitate a felony drug crime. Judge Ferguson suggested that this language may require some current or contemplated use for illegal purposes at the time of forfeiture, and that to be timely, forfeiture proceedings should be "initiated shortly after filing, but prior to termination," of state criminal proceedings. 861 F.2d at 236. Respondent contends that because the property was last used to commit a drug offense in 1985, it was no longer subject to forfeiture under Judge Ferguson's analysis when this forfeiture action was filed.

The court of appeals correctly rejected that argument. Pet. App. 5a n.2. Section 881(a)(7) provides that when real property "is used, or intended to be used," to commit or facilitate commission of a felony drug crime, it becomes subject to forfeiture, and no property right exists in the property. Under 19 U.S.C. 1621, the United States then has five years from the date of discovery within which to bring a forfeiture action to perfect its title. It is not necessary that the property still be "used, or intended to be used," to commit a drug offense at the time the forfeiture proceeding is brought.

designed to secure order, system, and *dispatch* in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected." *Ibid.* (emphasis added).[10] "Provisions of this character," the Court explained, "are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated." *Ibid.*[11]

The provisions of 19 U.S.C. 1602-1604 on which respondent relies are designed to secure "dispatch" in enforcement of the customs (and drug) laws, and they are not "accompanied by negative words" stating that a forfeiture action shall *not* be filed if the underlying violation has not been "promptly" reported to the U.S. Attorney. Under *French*, then, the failure to make such a report is not a bar to suit. See also *Brock* v. *Pierce*

[10] Contrary to respondent's suggestion, the requirements of "dispatch" in 19 U.S.C. 1602-1604 are not "intended for the protection of the citizen, and to prevent a sacrifice of his property." Br. 44 (quoting *French*, 80 U.S. (13 Wall.) at 511). As we explain in the text, that is the function of the statute of limitations. See Gov't Br. 40-41. Rather, as the court of appeals acknowledged, 19 U.S.C. 1602-1604 impose "internal" reporting and filing requirements (see Pet. App. 5a); they are intended for the benefit of the government itself. See Gov't Br. 40-43.

[11] Respondent seeks to distinguish *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990), on the ground that the magistrate and district judge play a role in ensuring compliance with time limits under the Speedy Trial Act, 495 U.S. at 721, and *Brock* v. *Pierce County*, 476 U.S. 253 (1986), on the ground that an aggrieved local government could bring an action under the Administrative Procedure Act to compel agency action if there had been undue delay, 476 U.S. at 260 n.7. There is a comparable remedy, however, where the property has been seized but forfeiture proceedings have not yet been instituted. See *$8850*, 461 U.S. at 568-569. Where, as here, the property has not been seized, there is no substantial likelihood of irreparable injury that could form the basis for such relief.

County, 476 U.S. 253, 259 (1986) (statute "specified no consequences for the failure" to comply with deadlines). By contrast, the statute of limitations in 19 U.S.C. 1621 does provide that "[n]o suit or action to recover any * * * forfeiture * * * shall be instituted" unless it is commenced within five years after the time when the alleged offense was discovered. Thus, a comparison of 19 U.S.C. 1602-1604 with 19 U.S.C. 1621 strongly reinforces the conclusion that only the latter confers a right on a claimant to have a forfeiture action dismissed on untimeliness grounds.[12]

In respondent's view (Br. 44), dismissal nevertheless is indicated by the use in 19 U.S.C. 1602-1604 of the term "shall" in describing the duties of the various government officials. That argument, however, was rejected in both *Pierce County* and *United States* v. *Montalvo-Murillo*, 495 U.S. 711 (1990), where the relevant statutes likewise used the term "shall" but the Court concluded that the government did not lose the power to act if the mandatory duties were not complied with. The Court was "most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake." See *Montalvo-Murillo*, 495 U.S. at 718 (quoting *Pierce County*, 476 U.S. at 260). Thus, although respondent may be correct that the prompt reporting of drug violations and prompt filing of forfeiture actions serves important public purposes by removing property from the hands of criminals, halting its continued use for illegal purposes, and preventing conversion of the property into non-traceable assets (see Resp. Br. 48), it

[12] Contrary to respondent's contention (Br. 46-47), that conclusion also is strongly supported by this Court's disposition of the statutory timeliness issue in *$8850*. See Gov't Br. 43-45.

does not follow that a forfeiture action must be dismissed if it was not instituted with what a court might believe to be the appropriate degree of promptness. Dismissal would both confer a windfall on persons who used their property for illegal purposes and altogether foreclose (not merely delay) the accomplishment of the important public purposes underlying the forfeiture laws.

As long as the forfeiture action remains timely under the five-year statute of limitations in 19 U.S.C 1621, claimants are protected, to the precise extent Congress deemed appropriate, against the consequences of delay about which respondent speculates (see Resp. Br. 48-49). There accordingly is no basis in the statutory scheme for dismissal of the forfeiture action. That is especially so where, as here, the property in question was not seized and retained in government custody before the forfeiture action was commenced.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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Solicitor General

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